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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 297

HERMAN FREDERICK WILLKIE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 15–18) is not reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 93–99) is reported at 127 F. (2d) 953.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 12, 1942 (R. 93). The petition for writ of certiorari was filed August 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The petitioner was employed at $30,000 a year. Upon his resignation, he was given an additional $15,000 "equal to six months' salary in appreciation of services rendered." Was the $15,000 properly subjected to federal income tax as additional compensation under Section 22 (a) of the Revenue Act of 1936?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, * * *.
>
> (b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> * * * * *
>
> (3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);
>
> * * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

> ART. 22 (a)-2. *Compensation for personal services.*—Commissions paid sales-

men, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable. * * *

STATEMENT

The facts, as found by the Board of Tax Appeals, may be stated as follows:

Hiram Walker-Gooderham & Worts, Limited, is a Canadian company which operates entirely through subsidiaries. Hiram Walker & Sons, Limited, is the subsidiary operating in Canada; Hiram Walker & Sons, Incorporated, is the subsidiary operating in the United States (R. 15–16).

Petitioner was originally employed by Hiram Walker & Sons, Limited, on February 15, 1927, and later became its general superintendent and a director of that company. Hiram Walker & Sons, Incorporated, was incorporated in 1933 and petitioner became vice president in charge of production of that company, his duties being to build,

organize and operate a distillery in Peoria, Illinois (R. 16).

Petitioner became a director of Hiram Walker-Gooderham & Worts, Limited, about November 1933, and received an annual director's fee of $2,000 per year. Petitioner devoted practically all of his time to the affairs of Hiram Walker & Sons, Incorporated, and his salary was paid by that company. For the years 1936 and 1937, his salary was $30,000 per year. This was like in amount to the salary received by the chairman of the boards of the parent company and Hiram Walker & Sons, Incorporated, and was equal to 75% of the salary received by the president of Hiram Walker & Sons, Incorporated (R. 16).

On May 12, 1937, petitioner tendered his resignation as an employee of Hiram Walker & Sons, Incorporated, to its president, Mr. Hume. Action on it was deferred until a meeting of the board of directors of Hiram Walker-Gooderham & Worts, Limited, which was to be held in about 10 days (R. 16).

On May 28, 1937, petitioner attended the meeting of the parent company and tendered his resignation as an employee of Hiram Walker & Sons, Incorporated, and as a member of the board. He stated his reasons to be that he felt that his talents were not being utilized and that his major work had been completed. After a request for reconsideration, which petitioner refused, his resigna-

tion was accepted. He then left the meeting and thereafter the following resolution was passed (R. 17):

> It was moved by Mr. McCarthy, seconded by Mr. Lash, and unanimously carried, that Mr. Willkie be given a cheque equal to six months' salary in appreciation of services rendered.

Petitioner indicated that he did not wish to accept such a check, but he was urged to do so. A check of Hiram Walker & Sons, Incorporated, in the amount of $15,000, was handed petitioner on May 31, 1937, which he accepted. At the time petitioner resigned, he had been paid sums due him under his contract of employment with Hiram Walker & Sons, Incorporated, and as a director of the parent company (R. 17).

Petitioner did not report the $15,000 as taxable income on his federal income tax return for 1937 but indicated that he had received that amount as a gift from Hiram Walker & Sons, Incorporated (R. 17). The federal income tax return of Hiram Walker & Sons, Incorporated, for the year in question showed that it deducted the $15,000 for the purpose of arriving at its taxable income, claiming it as compensation paid petitioner (R. 17).

The Board of Tax Appeals held that the payment in question was compensation to petitioner for services rendered and not a gift (R. 18). The Circuit Court affirmed (R. 99).

ARGUMENT

The conclusion reached by the Board of Tax Appeals, and affirmed by the court below, that the amount received by the petitioner from the employer company was additional compensation for services rendered, and not a gift within the meaning of the income tax statutes, involves the application of recognized general principles to the particular facts of the case, and presents no basis for the issuance of the writ.

1. The petitioner asserts (Pet. 6) that the decision here conflicts with the decision of this Court in *Bogardus* v. *Commissioner,* 302 U. S. 34. But in that case this Court recognized that it would serve no useful purpose to attempt to reconcile the numerous decisions dealing with this question and proceeded to look to the facts and circumstances of the particular case before it.

In analyzing the situation in the *Bogardus* case, this Court first emphasized the fact that the recipients of the bounty there never were employees of the Unopco Company, which made the payments in question. This Court further buttressed its conclusion that the payments could not be treated as compensation by reference to the stipulated fact that the disbursements were not made or intended to be made for any services rendered to the Unopco Company. This Court then stated that if the disbursements had been made by the Universal Company, the employer of the recip

ients, there might be ground for the inference that they were payments of additional compensation, referring at that point to *Noel* v. *Parrott,* 15 F. (2d) 669 (C. C. A. 4th), certiorari denied, 273 U. S. 754, which involved facts very similar to those of the case at bar.[1] Thus, we submit, the *Bogardus* decision does not announce the basic principle upon which petitioner relies, that taxability depends upon present or anticipated consideration, as distinguished from past consideration. There, as here, the decision depended upon the particular facts and circumstances.

In *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716, 730, this Court ruled that the "payment for services, even though entirely voluntary," may nevertheless be compensation within the meaning of the income-tax statute. In that case this Court referred approvingly to *Noel* v. *Parrott, supra,* a decision similar to that of the circuit court in this case. Thus the applicable decisions of this Court are not inconsistent with the decision below.

2. The petitioner further asserts (Pet. 5) that the decision below conflicts with *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3d), and *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C.

[1] In the *Noel* case, the court approved a tax upon payments made to officers who were then resigning from the company, although the resolution referred to the payments as (p. 669) "a gratuitous appropriation."

A. 3d).[2] The *Jones* decision is distinguishable because of the fact that the payment to the taxpayer there was made by the stockholders individually and not by the employer company. In that respect the case is similar to the *Bogardus* case. The reasoning of the *Cunningham* case would mean that a bonus was never taxable compensation. This reasoning cannot survive the *Bogardus* decision and affords no support for the petitioner's asserted distinction between present and past consideration. The payment there involved was awarded to an officer who resigned by request.

3. The assertion (Pet. 6–7) that the Circuit Court of Appeals departed from the usual course of judicial proceedings, in giving weight to a presumption that the company's books would have shown that the payment was treated as compensation, is without substance. In view of the burden of proof upon the taxpayer here, the stipulation (R. 40–41) that the company treated the $15,000 payment as compensation in computing its income tax for the year in question, and the requirement that returns be made in accordance with the books, the court below was warranted in assuming that

[2] The decisions reached in *Hall* v. *Commissioner*, 93 F. (2d) 1005 (C. C. A. 4th), and *Simpkinson* v. *Commissioner*, 93 F. (2d) 1015 (C. C. A. 5th), likewise asserted to be in conflict, need not be separately discussed since they are based upon the same facts as were involved in the *Bogardus* decision, *supra*.

the payment was treated as compensation on the books of the company.[3] It has been held several times that in such circumstances proof of the treatment in the employer's income-tax returns alone is sufficient to sustain the finding. *Noel* v. *Parrott, supra; Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9th); *Commissioner* v. *Bonwit,* 87 F. (2d) 764 (C. C. A. 2d).

CONCLUSION

The decision below is correct. It involves the application of recognized general principles to the particular facts and circumstances of this case. There is no conflict. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

SEPTEMBER 1942.

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[3] Taxpayers are entitled to subpoenas for the production of necessary books. Section 908, Revenue Act of 1924, c. 234, 43 Stat. 253, as amended by Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9.

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